MOTION FILED
JUN 30 1989

No. 88-1958

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SUPREME BEEF PROCESSORS, INC.,
Petitioner,
v.
ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

WILLIAM J. AUGELLO
Counsel of Record
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
Counsel for Amicus Curiae

Of Counsel:
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

June 30, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1958

SUPREME BEEF PROCESSORS, INC.,
Petitioner,

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

Movant, Shippers National Freight Claims Council, Inc. ("SNFCC"), pursuant to Rule 36.1 of the Rules of this Court, moves for leave to file the accompanying proposed brief *amicus curiae* in support of the position of the petitioner herein. As grounds for this motion, SNFCC states as follows:

1. Consent to file the brief *amicus curiae* has been requested of the Respondent by undersigned counsel but has been denied by it.

2. SNFCC is a voluntary, nonprofit organization, incorporated under the laws of the State of New York, with offices in Huntington, NY.

3. The membership of SNFCC is comprised of more than 750 companies which purchase freight transportation services from rail and motor carriers throughout this country, as well as Canada, and, hence, are concerned about freight charges and claims disputes.

4. SNFCC conducts seminars, publishes newsletters and reference books and otherwise endeavors to educate its members on the need for a sound transportation system and the means for effectively and fairly resolving freight charge and claims disputes.

5. Many, if not most, of the members of SNFCC within the last few years have been the subject of undercharge claims by the estates of defunct motor carriers, such as the Respondent in the instant proceeding. Thus, they have become the unwitting victims of the clash between the lower courts as to the obligation of freight shippers to pay the motor carriers' filed rates, notwithstanding that such rates, and the associated practices of the motor carriers (apparently including widespread misquotation of the filed rates), may have been unreasonable, in violation of 49 U.S.C. § 10701(a).

6. The members of SNFCC, moreover, have been buffeted by the ongoing disputes among the lower courts as to the jurisdiction of the Interstate Commerce Commission to determine the reasonableness issues, when asserted by shippers as defenses to motor carrier undercharge claims, and as to the deference that is due the agency's decisions.

7. These continuing controversies would be resolved by a grant of the Petition for a Writ of Certiorari in this, the first of the current spate of undercharge cases to have been decided by a United States Court of Appeals. A grant of the writ would serve to minimize the conflicts between the lower courts and, hence, to conserve judicial resources. It likewise would curb the inordinate expenditures of resources currently faced by SNFCC's members in defending themselves against the unwarranted motor carrier undercharge claims with which they are being inundated.

WHEREFORE, Movant, Shippers National Freight Claims Council, Inc., prays that it be permitted to file the accompanying brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM J. AUGELLO
Counsel of Record
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
Counsel for Amicus Curiae

Of Counsel:
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

June 30, 1989

QUESTION PRESENTED

Whether the filed rate doctrine, considered in light of the relaxed regulatory requirements mandated by the Motor Carrier Act of 1980, permits the Interstate Commerce Commission to exercise its exclusive jurisdiction to determine, under 49 U.S.C. §§ 10701(a) and 11705(b), the reasonableness of the rates and related practices of a motor common carrier which:

—has solicited freight business on the basis of reduced or discounted rates which it intentionally or negligently had not published in its tariffs as required by 49 U.S.C. § 10761;

—has enjoyed business from customers who reasonably relied on the reduced or discounted rates, did not know they were unpublished, and who timely paid the carrier's invoices based thereon; and

—later, after filing for bankruptcy or otherwise ceasing to operate, has caused its former customers to be sued for the difference between the reduced rates it unlawfully had failed to publish and the tariff rates duly filed with the ICC.

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE	i
QUESTION PRESENTED	v
TABLE OF AUTHORITIES	ix
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. MOTOR CARRIER DEREGULATION HAS LED TO RATE REDUCTIONS, BANKRUPTCIES, AND AN ENORMOUS VOLUME OF UNDERCHARGE LITIGATION RAISING THE SAME ISSUES PRESENTED HERE	2
II. THE RATES SOUGHT TO BE COLLECTED, OR THE CLAIMANT MOTOR CARRIER'S ASSOCIATED PRACTICES, MAY HAVE BEEN DEMONSTRABLY UNREASONABLE	4
III. THE COURT BELOW, AS HAVE CERTAIN DISTRICT AND BANKRUPTCY COURTS, MISAPPREHENDED THE FILED RATE DOCTRINE	6
CONCLUSION	12

APPENDICES

Appendix A—DIGEST of Unreasonable Carrier and Forwarder Practices Resulting from the Pro-Competitive Environment Created by The Motor Carrier Act of 1980

Appendix B—MOTOR CARRIERS Involved in Undercharge Actions Against Members of Shippers National Freight Claims Council, Inc.

TABLE OF CONTENTS—Continued

Appendix C—COURT DECISIONS Which Have Referred the Issue of Reasonableness of Carrier Rates and Practices to the ICC

Appendix D—COURT DECISIONS Denying Referral of Reasonableness Issues to the ICC

TABLE OF AUTHORITIES

SUPREME COURT CASES: Page

American Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co., 387 U.S. 397 (1967) 5
Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370 (1932) 8
General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940) 8
Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962) 8
ICC v. Union Pac. R.R. Co., 222 U.S. 541 (1912) 12
Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922) 7
Louisville & N.R.R. Co. v. Maxwell, 237 U.S. 94 (1915) 7
McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 12
Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934) 12
Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913) 8, 11
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 8
Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 8
T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) 11
United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946) 11, 12
United States v. Western Pac. R.R. Co., 352 U.S. 59 (1971) 8

OTHER FEDERAL CASES:

American Trucking Ass'ns, Inc. v. ICC, 770 F.2d 535 (5th Cir. 1985) 2
Caravan Refrigerated Cargo, Inc. v. Yaquinto, 864 F.2d 388 (5th Cir. 1989) 3, 7, 9, 10, 11
Feldspar Trucking Co. v. Greater Atl. Shippers Ass'n, Inc., 683 F. Supp. 1375 (N.D. Ga. 1987) 6, 7

TABLE OF AUTHORITIES—Continued

Page

Hanson v. Norfolk & W. Ry. Co., 689 F.2d 707 (7th Cir. 1982) 10
In re Taynton Freight Sys., 76 Bankr. 971 (Bankr. M.D. Pa. 1987) 7
INF, Ltd. v. Spectro Alloys Corp., 690 F. Supp. 808 (D. Minn. 1988) 12
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 705 F. Supp. 1401 (W.D. Mo. 1988) 12
Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) 8
Motor Carrier Audit & Collection v. Portion Packing, Inc., 683 F. Supp. 202 (N.D. Ill. 1988) 6
National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968) 11
Port Norris Exp. Co., Inc. v. ICC, 757 F.2d 58 (3d Cir. 1985) 2
Seaboard Sys. R.R. Inc. v. United States, 794 F.2d 635 (11th Cir. 1986) 10
United States v. United States Steel Corp., 645 F.2d 1282 (8th Cir. 1981) 10
United States v. Yellow Freight Sys., Inc., 762 F.2d 737 (9th Cir. 1985) 10
Western Transp. Co. v. Wilson & Co., Inc., 682 F.2d 1227 (7th Cir. 1982) 10

INTERSTATE COMMERCE COMMISSION DECISIONS:

Exemption of Motor Contract Carriers From Tariff Filing Requirement, 133 M.C.C. 150 (1983); *aff'd, Central & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 757 F.2d 301 (D.C. Cir. 1985) 3
Lawfulness of Volume Discount Rates by Motor Common Carrier of Property, 365 I.C.C. 711 (1982) 3

TABLE OF AUTHORITIES—Continued

Page

National Indus. Transp. League—Petition to Inst. Rule on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 5

Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980, Ex Parte Docket No. MC-166 (unreported), served September 13, 1983 3

Rates For a Named Shipper or Receiver, 367 I.C.C. 959 (1984) 3

STATUTORY PROVISIONS AND OTHER AUTHORITIES:

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C. subtitle IV (1982) 2

5 U.S.C. § 706 11

49 U.S.C. § 10701 9

49 U.S.C. § 10701(a) 4, 5, 12

49 U.S.C. § 10761 ..... 4, 8

49 U.S.C. § 11705(b)(3) 9, 12

49 U.S.C. § 11706 11

Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 253, 89th Cong., 1st Sess., April 22, 1965 11

101st Annual Report of the Interstate Commerce Commission, 55 (1987) 2

Glaskowsky, *Effects of Deregulation on Motor Carriers, Eno Foundation for Transp., Inc.* 8 (1986) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1958

SUPREME BEEF PROCESSORS, INC.,
Petitioner,

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC. IN SUPPORT OF PETITIONER

Shippers National Freight Claims Council, Inc. ("SNFCC")[1], pursuant to Rule 36.1 of the Rules of this Court, as its proposed brief *amicus curiae*, states, as follows:

---

[1] The organization and its interests in this proceeding are identified in the accompanying Motion for Leave to File.

SUMMARY OF ARGUMENT

The filed rate doctrine, as enunciated by this Court in the *Maxwell* and *Keogh* cases, permits the assertion of the unreasonableness of the carrier's rates or practices as a defense to an undercharge claim. When this defense is raised, the court proceedings must be stayed and the reasonableness issue referred to the Interstate Commerce Commission ("ICC"), as this Court held in the *General American* and *Western Pacific* cases. In failing to follow these fundamentals, the court below, not only misapprehended the teachings of this Court's decisions, but placed itself at odds with every other Court of Appeals that has considered the matter.

ARGUMENT

I. MOTOR CARRIER DEREGULATION HAS LED TO RATE REDUCTIONS, BANKRUPTCIES, AND AN ENORMOUS VOLUME OF UNDERCHARGE LITIGATION RAISING THE SAME ISSUES PRESENTED HERE.

The Nation's motor carrier industry has been deregulated substantially, both by the enactment of the Motor Carrier Act of 1980 (hereafter cited as "1980 Act")[2] and by the decisions of the ICC since then.[3] The great number of new entrants into the trucking business, coupled with the vast expansions of those already in it,[4] has resulted in fierce competition between the motor car-

---

[2] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in scattered sections of 49 U.S.C., subtitle IV (1982)).

[3] *See, e.g., American Trucking Ass'ns, Inc. v. ICC*, 770 F.2d 535 (5th Cir. 1985); *Port Norris Exp. Co., Inc. v. ICC*, 757 F.2d 58 (3d Cir. 1985).

[4] *See, e.g., 101st Annual Report of the Interstate Commerce Commission* 55 (1987).

riers and in dramatic rate reductions and discounts from charges that otherwise would apply.[5]

Many motor carriers, in order to preserve market shares, have cut their rates and charges below compensatory levels and ultimately have been driven to bankruptcy.[6] Subsequently, numerous freight rate audit bureaus have secured retainers from debtor carriers or their trustees for the sole purpose of conducting post-audits of the carriers' paid freight bills. These audits often have confirmed what the audit bureaus well knew when securing their retainers, namely, that the debtor carriers' sales representatives, intentionally or unwittingly,[7] had been soliciting shippers' freight business on

---

[5] *See, e.g., Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984); *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711 (1982); Ex Parte Docket No. MC-166, *Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of 1980* (unreported), served September 13, 1983. *See also, Exemption of Motor Contract Carriers From Tariff Filing Requirement*, 133 M.C.C. 150 (1983), *aff'd, Central & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 757 F.2d 301 (D.C. Cir. 1985), in which the ICC exempted contract carriers from the tariff filing requirement, an action erroneously ascribed by the court below to the Congress. 864 F.2d at 390, 391; Appendix B to Petition for a Writ of Certiorari ("Cert. Pet. App. B") at 6-7.

[6] "Among the largest 100 carriers, during [the years 1978 through 1985] approximately 20 percent failed, including McLean Trucking and Spector-Red Ball, then ranked fifth and sixth, respectively. Most recently, Hall's Motor Transit (No. 17), filed for bankruptcy under Chapter 11. Other major failures in the top 100 included Interstate Motor Express, Gordon's Transport, IML Freight, Commercial Lovelace, Cooper-Jarrett, and others." Glaskowsky, *Effects of Deregulation on Motor Carriers*, Eno Foundation for Transportation, Inc., Washington, D.C., 8 (1986).

[7] Anecdotal examples of misleading solicitations and other practices, which have come to SNFCC's attention through its work with shipper defense groups in cases similar to this one (*see infra*, Part II), are offered in Appendix A to this brief.

the basis of rate reductions or discounts which the carriers had not published in their tariffs on file with the ICC. The audit bureaus, relying on the continuing requirement of 49 U.S.C. § 10761 for publication of motor common carrier rates in tariffs and ostensibly seeking to maximize the estates of the bankrupt carriers, have lodged undercharge claims in the name of the debtors or their trustees against the carriers' former customers.[8] These claims have been based on the differences between the charges actually paid by the shippers in reliance on the quoted rates, on the one hand, and, on the other hand, the charges that assertedly should have been paid in accordance with the published and filed tariffs.

When shippers have declined to pay such claims, lawsuits for the asserted undercharges have followed, either as adversary cases within a bankruptcy proceeding or as separate actions in Federal or state courts. Such actions literally have numbered in the hundreds within the last several years, as attested by the partial listing of cases in the Petition for a Writ of Certiorari (Cert. Pet. Apps. G, H). The total amounts at issue are estimated by SNFCC to be in the range of $30 to $50 million.

II. THE RATES SOUGHT TO BE COLLECTED, OR THE CLAIMANT MOTOR CARRIER'S ASSOCIATED PRACTICES, MAY HAVE BEEN DEMONSTRABLY UNREASONABLE.

In most of the undercharge proceedings, the defendant shippers have defended on the grounds, among others, that the rates sought to be collected or the motor carriers' associated practices were unreasonable, in violation of 49 U.S.C. § 10701(a). A threshold controversy in almost all such actions has been whether the proceedings should be stayed, pending referral of the reasonableness issues to the ICC. The defendant shippers properly and under-

[8] A partial listing of the motor carriers involved in undercharge actions against SNFCC members appears in Appendix B to this brief.

standably have urged referral, on the basis of the seminal decision of the ICC in *National Indus. Transp. League—Petition to Institute Rule on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

In the cited proceeding, hereafter referred to as *Negotiated Rates*, the ICC correctly held that the filed rate doctrine, *infra* Part III, did not bar a shipper from asserting an unreasonableness defense to an undercharge claim brought on behalf of a motor carrier.[9] The ICC further held in *Negotiated Rates* that, if the facts established (1) quotation of a rate other than the tariff rate by a carrier representative with apparent authority upon which the shipper legitimately could rely, (2) an understanding between them that the shipment could be made upon that rate and (3) reasonable reliance by the shipper upon the rate quotation in tendering the freight to the motor carrier, then the misrepresentation that the quotation reflected the published and filed rate, subsequently the source of the undercharge claim, constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a).

The plaintiff audit bureaus and motor carrier estates, on the other hand, have resisted referral to the ICC. They mistakenly have argued that the filed rate doctrine does not permit the assertion of rate or practice unreasonableness as a defense and that, accordingly, such referral is unnecessary, for the rate as published and filed by the motor carrier inevitably must be paid.

The clash of these viewpoints in the federal district courts, the bankruptcy courts and various state courts has produced a serious split of authority, although the majority view supports referral to the ICC. SNFCC has monitored the development of this split of authority as part of an ongoing program to assist its shipper mem-

---

[9] The ICC construed the filed rate doctrine in the light of contemporary conditions in the motor carrier industry, as it patently was permitted to do. *American Trucking Ass'ns v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

bers in the formation of joint defense groups to resist undercharge claims. At this writing, SNFCC is aware of over 100 court decisions granting motions for referral of reasonableness issues to the ICC in motor carrier undercharge cases (*see* Cert. Pet. App. G), and approximately 50 court decisions denying such referral. In many instances, courts within a single state, or even the district court and the bankruptcy court within a single federal judicial district, have reached diametrically opposite conclusions on this issue. Although most decisions on each side of the issue are unreported memorandum opinions or *per curiam* orders, they are listed in appendices to this brief for the limited purpose of illustrating the magnitude of the problem these cases present to shippers, carriers and the judicial system alike.[10]

III. THE COURT BELOW, AS HAVE CERTAIN DISTRICT AND BANKRUPTCY COURTS, MISAPPREHENDED THE FILED RATE DOCTRINE.

The court below foreclosed the defendant shipper from asserting the unreasonableness of the motor carrier's rates or practices as a defense to the undercharge claims brought against it. In so doing, the court below, as have certain district and bankruptcy courts,[11] grievously mis-

---

[10] Appendix C provides a geographically organized listing of known decisions granting referral, while Appendix D provides similar information on known decisions denying referral. Official reporter citations (or, as a second choice, paragraph citations to *Federal Carrier Cases*) are provided wherever available. In other instances, unreported court decisions granting referral can be further identified by reference to the ICC docket number of the proceeding in which the agency addresses the referred issues, and SNFCC is providing this information wherever possible. SNFCC, however, does not seek herein to rely on any of the decisions listed for the Court's convenience in Appendices C and D, except to the extent that such decisions may be included (with appropriate citations) in the Table of Authorities accompanying this brief.

[11] *See, e.g., Motor Carrier Audit & Collection v. Portion Packing, Inc.*, 683 F. Supp. 202 (N.D. Ill. 1988); *Feldspar Trucking Co. v.*

apprehended the filed rate doctrine upon which it sought to rely. The filed rate doctrine had its genesis in *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), wherein this Court declared:

> Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable* [emphasis added].

It is the italicized clause that preserves to the defendant shippers the right to assert the unreasonableness defense. Significantly, the court below, as have certain others, omitted the underscored clause in quoting the excerpt from this Court's *Maxwell* decision. 864 F.2d at 390; Cert. Pet. App. B at 5.[12]

That the filed rate doctrine comprehends the assertion of a reasonableness defense before the ICC was underscored, again, by this Court's decision in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), again cited by the court below, as by many others, but only partially. In the *Keogh* case, 260 U.S. at 163, this Court said:

> The legal rights of shipper against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside* [*by the ICC*], this rate is made, for all purposes, the legal rate, as between carrier and shipper [emphasis added].

Greater Atl. Shippers Ass'n, Inc., 683 F. Supp. 1375 (N.D. Ga. 1987); *In re Taynton Freight Sys.*, 76 Bankr. 971 (Bankr. M.D. Pa. 1987).

[12] Whether the omission was inadvertent or deliberate we do not know. We do suggest, however, that, if the excised version of the relevant portion of this Court's *Maxwell* decision reflects the lower court's understanding of the filed rate doctrine, the lower court is in error, and its decision requires *per curiam* reversal on this ground alone.

Nothing in this Court's affirmation of *Keogh* in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), alters the holding just quoted.

The reason for the rule is obvious. As this Court noted in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932):

> [T]he legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under section 6 [49 U.S.C. § 10761], the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparations.

Accord Middlewest Motor Freight Bureau v. United States, 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) (stating that "[M]erely because the carrier is bound to charge the filed rate, it does not follow that he is entitled to keep it"). Moreover, if a reasonableness issue requires referral to the ICC when raised in a shipper's action for reparations from a carrier, the primary jurisdiction of the ICC applies in equal measure when a shipper raises the same issue by way of defense to a carrier's undercharge action. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 71 (1956). Of even greater significance here, the agency's primary jurisdiction over reasonableness issues extends to a motor carrier's rate-related practices as well as to the rates themselves. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962).

The exclusive jurisdiction of the ICC over rate and practice reasonableness issues has been recognized for generations. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 196 (1913); *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907). This Court definitively restated the principle in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940), as follows:

> When it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the court should have stayed its hand pending the Commission's determination of the *lawfulness and reasonableness of the practice* under the terms of the Act. . . . [The] cause should be held pending the conclusion of an approfenses the petitioner may have will be saved to it [emphasis added].

It necessarily follows from these premises that, if the unreasonableness of the motor carrier's rates or practices is asserted as a defense in an action for undercharges (as it was here by Petitioner), then the court case must be stayed, pending referral of the reasonableness issues to the ICC. Indeed, the determination of the reasonableness of a motor carrier's rates or practices is committed to the exclusive jurisdiction of the ICC; the issue is lodged with the agency by statute, not just by judicial precedent relating to primary jurisdiction. Thus, an essential statutory element of a motor carrier's liability to shippers for "imposition of rates for transportation or service" which violate the ICC's governing statute, including the reasonableness standard of 49 U.S.C. § 10701, is that the violation be one which "the Commission finds." 49 U.S.C. § 11705(b)(3). If a court prohibits a shipper from timely requesting such a finding by the ICC, the only body empowered to make it, the result is no less than a deprivation of the shipper's due process of law.

Despite the foregoing, the court below asserts that it needs no ICC assistance to resolve what it characterizes as simple tariff-construction issues. 864 F.2d at 390, Cert. Pet. App. B at 4. In taking such a crimped view of the time-honored primary jurisdiction doctrine, the court below has fallen seriously out of step with the other Courts of Appeals that have addressed ICC referral issues subsequent to the regulatory reforms enacted in 1980. Even though an issue referred to the ICC might

involve tariff construction issues on its face, referral nonetheless is proper if the issue also implicates questions of "transportation policy" on which "uniform and expert" ICC guidance is necessary, *United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737, 739 (9th Cir. 1985), or if a statutory referral obligation exists, as demonstrated *supra*.

Other post-1980 cases taking a broad view of the types of issues committed to the primary jurisdiction of the ICC have included *Hanson v. Norfolk & W. Ry. Co.*, 689 F.2d 707 (7th Cir. 1982) (allegation that trailer-on-flatcar service, long an object of ICC policy concerns, was being provided without proper tariff authority); *Western Transport Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982) (undercharge defendant's allegation that tariff requirement for certain notations on bills of lading was unreasonable prerequisite for applicability of motor carrier discount rates); and *United States v. United States Steel Corp.*, 645 F.2d 1285 (8th Cir. 1981) (assertions by shipper defendant under Hepburn Act, now codified at 49 U.S.C. § 11902, that tariff prohibiting alleged rebates was discriminatory, that industry usage affected proper tariff construction, and that shipper honestly and reasonably believed the tariff allowed rebates). *See also*, *Seaboard Sys. R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986).[13] Surely the primary jurisdiction doctrine applies as well here, given the transportation policy issues raised under the 1980 Act when bankrupt motor carriers systematically invoke the filed rate doctrine against a multitude of former customers to whom the

[13] The lower court sought to distinguish the *Seaboard* case on the ground that the tariff was, in its words, "unclear or ambiguous to the ordinary user." 864 F.2d at 392; Cert. Pet. App. B at 10. A fair reading of the decision, however, shows that the court affirmed the ICC's decision because the agency reasonably could hold, notwithstanding the same filed rate doctrine relied upon by respondents here, that it would not countenance the carrier's misquotation or misrepresentation of its rates.

carriers themselves misquoted rates, and given the need for "uniform and expert" ICC guidance to a judicial system seriously split over these issues.

Although there formerly was uncertainty whether the ICC could entertain trial court referrals of the unreasonableness of motor carrier rates or practices pertaining to past shipments, *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), any doubt that it can do so was removed by the 1965 revision of what is now 49 U.S.C. §11706. In speaking of the pertinent section of the bill, H.R. 5401, 89th Cong., 1st Sess., the Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 253, dated April 22, 1965, said:

> [It] would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations. This would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case. 359 U.S. at 464 . . . .

See National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968).

The ICC's finding of unreasonableness, of course, would be binding upon the referring court, absent abuse of discretion or want of substantial evidence. 5 U.S.C. § 706; *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960).[14] *Accord United States v. Pierce Auto*

---

[14] The court below erroneously refers to the Commission's decision in Ex Parte Docket No. MC-177 as being advisory only, 864 F.2d at 390; Cert. Pet. App. B at 5, when in fact it represents

Freight Lines, 327 U.S. 515, 536 (1946); *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934); *ICC v. Union Pac. R.R. Co.*, 222 U.S. 541, 547 (1912).[15]

CONCLUSION

The court below misapprehends the filed rate doctrine. Its decision ignores the teachings of this Court's earlier decisions, most notably in the *Maxwell* and *Keogh* cases, and is at odds with the decisions of all other United States Courts of Appeals that have considered the propriety of allowing unreasonableness of rates or practices to be asserted as defenses to undercharge claims.

To permit collection agencies and freight bill auditors to profit from carriers' past unlawful failure to publish their discount rates would undercut Congressional intent to make the trucking industry more competitive and, thus, to reduce the cost of motor carrier transportation for the Nation's shippers. The 1980 Act succeeded in creating intensified price competition through reduction of regulatory barriers, but neither Congress nor the ICC anticipated the unlawful manner by which many carriers implemented their price cuts. In view of the changes in national transportation policy mandated by Congress in 1980, the ICC's remedial actions in response to these unlawful acts were proper and must be upheld by reversing the Fifth Circuit's decision.

---

a well-formulated exercise of the agency's statutory powers under 49 U.S.C. §§ 10701(a) and 11705(b) (8), in addition to its exclusive jurisdiction over reasonableness issues as recognized in the decisions of this Court.

[15] Compounding the need for definitive guidance from this Court is the developing split of authority on whether or not to sustain ICC determinations that motor carriers' rate-related practices in undercharge situations are unreasonable. *Compare INF, Ltd. v. Spectro Alloys Corp.*, 690 F. Supp. 808 (D. Minn. 1988) *with Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988).

The Petition for a Writ of Certiorari, accordingly, should be granted.

Respectfully submitted,

WILLIAM J. AUGELLO
Counsel of Record
AUGELLO, PEZOLD & HIRSCHMANN
120 Main Street
Huntington, NY 11743
(516) 427-0100
Counsel for Amicus Curiae

Of Counsel:
FRITZ R. KAHN
MARK J. ANDREWS
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
Suite 700, The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6000

June 30, 1989

APPENDICES

APPENDIX A

DIGEST OF UNREASONABLE CARRIER AND FORWARDER PRACTICES RESULTING FROM THE PRO-COMPETITIVE ENVIRONMENT CREATED BY THE MOTOR CARRIER ACT OF 1980

1. A motor carrier's President negotiated rates with a major dress manufacturer, using a schedule of rates purported to be the filed tariff rates. After years of doing business at these rates, the parties experienced a conflict, and the shipper decided to discontinue doing business with this carrier. The carrier's president then threatened to institute a suit against the shipper for the difference between the billed rates and the actual tariff rates which were on file with the Commission without the shipper's knowledge, a sum which exceeded $1 million. (*Lady Carol Dresses v. The International Distribution Centers, Inc.*, MC-C-10867 (ICC)).

2. The carrier's Vice-President of Pricing established rate and discount policies for its salesmen but then published numerous restrictions and limitations in its tariff without the knowledge or consent of the salesmen or the shipper/customer. One such restriction limited the discount to points served *directly* by the carrier. Although the carrier held operating authority from the ICC to serve all points in the United States and advertised "Direct Single Carrier Service, Nationwide," the carrier then unilaterally routed portions of shippers' traffic via connecting carriers for its own operating convenience, thus voiding the discounts under a strict application of the tariff.

Before the carrier filed for bankruptcy, the Vice-President of Pricing and Assistant Controller left the carrier's employ and formed an auditing firm which obtained a contract from the Trustee to audit the bankrupt carrier's freight bills. This auditing firm has admitted collecting $8.5 million thus far in undercharges

which the Vice-President of Pricing helped to create during the course of his employment by the carrier. (*McLean Trucking Company and Pacesetter/Coliseum Cartage Company, Inc.*, Bankr. W.D.N.C.)

3. A carrier's President was asked why the negotiated rate was not being filed in the carrier's tariff to which he responded, "I don't know." The President then failed to bring the carrier's rate practices into compliance with the law, thus indicating management's consent to, and approval of this practice. (*Oneida Motor Freight v. Appco*, E.D.N.Y.)

4. A forwarder's President issued instructions to its sales force and tariff department to negotiate rates but not publish them unless a shipper insisted upon receiving a published tariff before tendering traffic, thus preventing its competitors from meeting their discounts. (*Wescar Freight Systems*, California and Oregon Federal and State Courts).

5. A carrier agreed to publish a negotiated rate in terms of dollars per truck load. However, when published and filed with the ICC, the carrier unilaterally added a 46,000 pound maximum in the tariff without informing the shipper. After a long period of billing at this rate, the carrier voluntarily discontinued business and began to issue undercharge claims for the excess weight shipped and accepted by the carrier without complaint. (*Rebel v. Muehlenstein*, W.D. Tenn.)

6. A forwarder agreed to publish a rate to Kings Mountain, N.C. and the shipper tendered traffic and paid the agreed rate to this point over a long period of time. After the carrier discontinued its business, it sold its freight bills to a collection agency which discovered that the forwarder erroneously published the rate to "Kings Mountain, TN," a *non-existent* point. The auditor filed undercharge claims totalling $128,763 based on the for-

warder's class rates. (*Wescar Freight Systems v. Freightliner*, D.C. Or.)

7. A forwarder's salesman was furnished a counterfeit copy of a tariff page alleging that it represented the rates filed on a specific date for the shipper. Traffic was tendered to the forwarder in reliance upon that representation, but the forwarder later sued for a higher rate when its collection agency discovered that the tariff page shown to the shipper was not filed until months later and in a different print. (*Wescar Freight Systems, Inc.*)

8. A motor carrier quoted flat rates over the telephone in order to obtain revenue to cover operating expenses for the back haul of its equipment to its home base. The rate quotation was verified by typing on the freight bill the name of the company official authorizing the rate. However, the rate quotation was never published in the carrier's tariff or filed with the ICC. (*Maislin*, E.D. Mich.).

9. A frieght salesman solicited a shipper's traffic, contending that the company holds contract carrier authority and a broker's license from the ICC. The parties agreed to a rate which the shipper believed was quoted by the salesman in his capacity as a broker possessing a contract with its contract carrier affiliate, thus avoiding the necessity for filing the rate. After bankruptcy, the collection agency billed the shipper for that company's *common* carrier tariff rates. (*Sharm Express, Inc.*, Bankr. Ct. Minn.).

10. A carrier indicated in its tariff that it participated in the National Motor Freight Classification, which is an essential tariff establishing a classification rating for each commodity shipped. However, the carrier failed to become a party to the classification thus rendering all of its class rates defective. The auditors ignored this defect and sued the carrier's former customers for the full class rates, contending that participation in the classifi-

cation is not necessary. (*Transportation Systems International, Inc.*, Bankr. Ct., Minn.)

11. A carrier required designated officers to approve all discount agreements, informing its salesmen that the rates were lawfully filed when the "Discount Request Form" was initialled by designated officers. The salesmen was not informed that the customer must request the discount in writing or that the discounts were conditioned on the volume of traffic tendered to the carrier each month.

After bankruptcy, one of the officials whose signature was required to approve discounts became an owner of the collection agency seeking the recovery of additional freight charges from the shippers for whom he approved the discounts on the grounds that no letter of participation was on file for those shippers, and/or that volume minimums were not met. The attorney representing the collection agency was the son of the former owner of the carrier and brother of one of its managing officers who was authorized to approve discounts. (*Transportation Systems International, Inc.*, Bankr. Ct. Minn.)

12. A carrier negotiated discounts with its shippers, but when published, its tariffs incorporated by reference a rule which conditions the discount upon the payment of freight charges within the carrier's credit rules. The latter rules were not brought to the shippers' or carrier salesmen's attention until after the carrier files for bankruptcy, at which time undercharge claims for the full amount of the discount were filed. (*Campbell 66*, D.N.J.)

13. Atrustee sold a bankrupt carrier's freight bills to a collection agency for auditing and filing undercharge claims. The collection agency then sued shippers in the Bankruptcy Court to gain an additional two years within which to recover claims, as provided by the Bankruptcy Act. When the Bankruptcy Judge dismissed these suits for lack of jurisdiction, the collection agency then attempted to regain the jurisdiction of the Bankruptcy

Court by agreeing to return 5 percent of the amounts collected to the Trustee, a scheme which the Bankruptcy Court later rejected. (*Coliseum Cartage Company, Inc.*, D.N.C.)

14. A carrier quoted rates to a broker by telephone, but never furnished a copy of its filed tariff although requested to do so by the broker. After bankruptcy, the collection agency billed the broker for late payment of freight charges published in the carrier's tariff which were never disclosed to the broker, consisting of 1.25 percent per month and attorney fees of 33 percent of the transportation and late payment charges. (*Coliseum Cartage*, D.N.C.)

APPENDIX B

MOTOR CARRIERS INVOLVED IN UNDERCHARGE ACTIONS AGAINST MEMBERS OF SHIPPERS NATIONAL FREIGHT CLAIMS COUNCIL, INC.

ADVANCE UNITED EXPRESSWAYS, INC.
ALLSTATE
AMERICAN FREIGHT SYSTEM, INC.
BRINKE TRANSPORTATION CORP.
CAMPBELL SIXTY SIX EXPRESS, INC.
COLISEUM CARTAGE COMPANY, INC.
DUDLEY TRUCKING
DUNKLEY TRANSPORTATION
EAGLE/FB
EAZOR TRUCKING
EXPRESS TRANSPORTATION COMPANY
FREIGHTCOR SERVICES, INC.
HALLS MOTOR TRANSIT COMPANY
R. L. HARRISON TRUCK COMPANY
INDIANHEAD TRUCK LINE
LEE WAY MOTOR FREIGHT, INC.
MAISLIN INDUSTRIES, U.S. INC.
MANLEY TRUCK LINE, INC.
MCLEAN TRUCKING COMPANY
MILNE TRUCK LINES, INC.
MISLETOE EXPRESS SERVICES
MURPHY MOTOR FREIGHT LINES, INC.
NOERR MOTOR FREIGHT, INC.
ONEIDA MOTOR FREIGHT, INC.
OVERLAND EXPRESS, INC.
REBEL MOTOR FREIGHT
RITTER TRANSPORTATION, INC.
RFI TRANSPORT, INC.
RTC
SANTA FE TRAIL
SHARM EXPRESS, INC.

SOUTHWESTERN MOTOR FREIGHT
SQUAW TRANSIT COMPANY
SUBURBAN MOTOR FREIGHT
S & W FREIGHT
SUTCO TRANSPORTATION
SYSTEM 99
TOBLER TRANSFER
TRANSPORTATION SYSTEM
INTERNATIONAL INC.
TOTAL TRANSPORTATION
TWIN CITY FREIGHT, INC.
UNITED SHIPPING COMPANY
WESCAR FREIGHT SYSTEM
L. C. WORLEY TRANSFER, INC.

APPENDIX C

COURT DECISIONS WHICH HAVE REFERRED THE ISSUE OF REASONABLENESS OF CARRIER RATES AND PRACTICES TO THE ICC

ARKANSAS

Prof. Trucking Auditing, Inc., v. Royal Oak Enters., Inc., No. LR-C-87-422 (E.D. Ark. Oct. 9, 1987), MC-C-30088 (Aug. 24, 1988).

Rebel Motor Freight v. Specialty Oil Co., LR-C-87 (E.D. Ark. Oct. 14, 1988) (¶ 83,316).

CALIFORNIA

Southwest Freight Lines v. Continental Holding, No. 48986 (Mun. Ct. Cal. Apr. 2, 1987), MC-C-30051 (Apr. 22, 1988).

RTC Transp. v. Country Pride Foods, No. S-86-1509 (E.D. Cal. July 9, 1987).

RTC & Transp. Int'l v. Alex Foods, No. 86-5628 DT (C.D. Cal.), MC-C-30085 (¶ 37,572).

Motor Carrier Audit and Collection Co. v. Conagra Poultry Co., No. S-87-0842-MLS (E.D. Cal.), MC-C-30064 (¶ 37,524).

Southwest Freight Lines v. Kaiser Aluminum, Inc., No. C-86-0275 (July 18, 1986), MC-C-30010.

West Coast Truck Line v. American Steel Inc., No. 5-87-104 (E.D. Cal. July 17, 1987), MC-C-30062 (Apr. 25, 1988).

NOTE: ICC Docket Numbers are designated "MC-C-30000," etc. The "¶ 37,000" series references are to Commerce Clearing House's Federal Carrier Cases reports for ICC decisions. The "¶ 80,000" series references are to CCH's court decisions in the same reports.

West Coast Truck Line v. Lily Tulip, No. CV-87-0929 (E.D. Cal. Oct. 29, 1987).

Wescar Freight Sys., Inc. v. Milwaukee Elec. Tool Corp., No. 89-6464 (Super. Ct. Apr. 4, 1989).

COLORADO

Delta Traffic Serv. v. Marine Lumber Co., 483 F. Supp. 734 (D. Colo. 1987).

DELAWARE

Delta Traffic Serv. & Campbell 66 Express Inc. v. ICI Americas, Inc., No. CA-88-196-CMW (D. Del. Mar. 23, 1989).

GEORGIA

Delta Traffic Serv. v. Commercial Cold Storage, Inc., No. C86-2132A (Mar. 23, 1987), MC-C-30005.

Delta Traffic Servs. Assignee of RTC Transp., Inc. v. George A. Hormel & Co., No. CA-87-27A (May 19, 1987).

Delta (Oneida & Claxton Transp.) v. Fort Howard Cup, (N.D. Ga.), MC-C-30108.

Delta Traffic Servs. (Oneida and Claxton Transport) v. K.R. Newsprint, Virginia Paper Mfg., CEI Newsprint, (N.D. Ga. Jan. 19, 1989), MC-C-30108.

Delta Traffic Servs. (Oneida) v. Knight-Ridder Newspaper Sales, Inc., 691 F. Supp. 339 (N.D. Ga. 1988).

ILLINOIS

Inman Freight Systs., Inc. v. Boise Cascade, No. 83-C-8968 (N.D. Ill. Aug. 2, 1988), MC-C-10928 (¶ 83,406).

Motor Carrier Audit & Collection (RTC) v. Orval Kent Food Co., No. 87-C-5860 (N.D. Ill. Oct. 2, 1987), MC-C-30081 (Nov. 22, 1988) (¶ 37,584).

Dependable Cartage & Transp. Co. v. Sovereign Oil Co., No. 84-C-4949 (N.D. Ill. Oct. 2, 1987), MC-C-30081 (Nov. 22, 1988) (¶ 37,584).

Tobler Transfer Bankr. Christison, Trustee v. Caterpiller, No. 85-00596, 74 Bankr. 373 (Bankr. Ct. C.D. Ill. May 29, 1987).

Tobler Transfer v. General Mills, Nos. 185-00596, 87-8050B (Bankr. Ct. C.D. Ill. Nov. 17, 1987), MC-C-30095 (Mar. 9, 1989).

Tobler Transfer v. Ottowa Strong and Strong Caterpillar, Inc., Nos. 185-00596, 86-8135, 8184 & 8215 (May 2, 1987), MC-C-30095 (Mar. 7, 1989).

Tobler Transfer v. Fleming Potter Co., Nos. 85-00596, 8050A (Bankr. Ct. C.D. Ill. Nov. 17, 1987).

Tobler Transfer v. Hiram Walker, 74 Bankr. 373 (Bankr. Ct. C.D. Ill. May 29, 1987), MC-C-30061 (Jan. 12, 1989).

Tobler Transfer v. Navistar Int'l Transp., MC-C-30116, Mar. 1989.

Orscheln Bros. Truck Lines v. Toastmaster, No. 84-C-7338 (N.D. Ill. Nov. 8, 1985), MC-C-10988 (Mar. 14, 1988 (decision of Sept. 28, 1988) (1988 Fed. Car. Cas. ¶ 83,410 (affirming ICC's decision in MC-C-10989).

Orscheln Bros. Truck Lines v. ooper Indus., No. 85-C-8398 (N.D. Ill. 1986) (decision of Sept. 28, 1988) (1988 Fed. Car. Cas. ¶ 83,410) (affirming ICC's decision in MC-C-10989).

Orscheln Bros., v. Anderson Clayton Co., No. 85-C-8639 (N.D. Ill. Nov. 24, 1987), MC-C-10955.

Orscheln Bros. Truck Line v. Zenith Elec. Corp., No. 85-C-8638 (E.D. Ill. Mar. 3, 1986), No. 40059 (July 7, 1987) (¶ 37,372).

Carriers Traffic Servs., Inc. & Orscheln Bros. Truck Lines, Inc. v. Von Hoffmann Press, Inc., No. 85-C-8796 (N.D. Ill. Sept. 25, 1986).

Consolidated Freightways Corp. of Delaware v. Sipi Metals Corp., No. MI-146070 (Cir. Ct. Ill. Mar. 11, 1987).

Merchant Stor-Dor Freight Sys. v. Otis Elevator, No. 85-C-1089, MC-C-30056, (Sept. 30, 1988).

INDIANA

Delta Traffic Service/Campbell 66 v. Woods Wire Prods., No. IP-88-466-C (April 19, 1989).

LOUISIANA

Garlepied Transfer v. Yanming Marine Line, No. 86-3640 (E.D. La. July 30, 1987), MC-C-30069.

Rebel Motor Freight, Inc. v. Southern Beverage Co., Inc., 673 F. Supp. 785 (M.D. La. 1987) (¶ 83,363).

MASSACHUSETTS

Zayre Corp. v. Anderson Motor Lines, No. 79-3912 (Sup. Ct. Mass. June 24, 1986), MC-C-30000.

Branch Motor Exp. v. Ampad Corp., No. 86-0204-F 6. (D. Mass. Sept. 16, 1988), MC-C-30080 (¶ 37,-560).

Branch Motor Exp. v. W.R. Grace & Co., No. 86-2408-Z (D. Mass. July 2, 1987), MC-C-30063, May 2, 1988 (¶ 37,486 & ¶ 37,526).

Delta Traffic Serv., Inc. & Oneida Motor Freight, Inc. v. Translop, No. 87-1739-WF (D. Mass. June 5, 1989).

MICHIGAN

Maislin Indus. v. A.J. Hollander, Nos. 83-03161, 85-0090, (Bankr. Ct. E.D. Mich. January 21, 1986); May 15, 1985; July 29, 1985; Oct. 20, 1986 (¶ 83,-311), MC-C-30013, June 30, 1988 (¶ 37,503). (ICC's decision aff'd in 4 of 41 cases, and recommended in others, proposed Order of Bankr. Ct., Dec. 9, 1988).

Maislin Indus. v. Auto Specialties Mfg. Co., No. 85-0753-R (Bankr. Ct. E.D. Mich.), MC-C-30007, Feb. 16, 1988.

Maislin Ind. U.S., Inc. v. Fort Howard Paper Co., Nos. 83-03161-W and 85-0822 (Bankr. Ct. E.D. Mich. Nov. 13, 1985) (amended Jan. 21, 1987), MC-C-10983.

Clairmont Transfer Co. v. Aeroquip Corp., Nos. 84-00203, No. 86-0317 (Bankr. Ct. W.D. Mich. May 28, 1987).

Tucker Freight Lines v. United Exposition, Bky. No. HK 83-2391, Adv. No. 85-0631, 85 Bankr. 426 (W.D. Mich. April 14, 1988) (¶ 83,400).

MINNESOTA

INF, Ltd. v. Spectro Alloys Corp., 651 F. Supp. 1405 (D. Minn. 1987) (ICC's decision rejected, 690 F. Supp. 808, July 18, 1988. Appeal pending in 8th Circuit).

Gordon's Transports, Inc. v. Pickwick Int'l, Nos. 85-20041 et al. (Minn. Dist., Hennepin County, Feb. 23, 1987), MC-C-30058.

MISSISSIPPI

Pongetti v. Bryan Foods, Nos. 84-10194, 86-0069 (Bankr. N.D. Miss. December 8, 1986), MC-C-30023 (ICC's finding rejected July 29, 1988 (¶ 83,399).

Robinson Truck Lines, Inc. v. Baldor Elec. Co., Nos. ES84-10194, 86-0064, 0069 & 0090 (Bankr. Ct. N.D. Miss.), MC-C-30019, Jan. 20, 1988.

Robinson Truck Lines, Inc. v. Artex Int'l, Inc., MC-C-30022, Apr. 1, 1988.

Robinson Truck Lines, Inc. v. Bryan Foods, MC-C-30023, Apr. 1, 1988 (ICC's findings not adopted July 29, 1988) (¶ 83,399).

MISSOURI

Maislin Industries v. Primary Steel, No. 85-0021-CV-W-1 (W.D. Mo. Sept. 3, 1985), MC-C-10961, Jan. 12, 1988 (ICC decision *aff'd*, 705 F. Supp. 1401 (1988)).

NEW JERSEY

Branch Motor Express v. Injected Rubber Prods. Corp., No. 86-2417 (Sup. Ct. N.J. June 17, 1987), MC-C-30054.

Delta Traffic Serv. and Campbell 66 v. Thomas J. Lipton, Inc., No. 88-1600 (D.N.J. Oct. 26, 1988), MC-C-30134.

Southwest Freight Lines v. Wakefern Foods Corp., No. L-069947-8 (Sup. Ct. N.J. Jan. 31, 1986), MC-C-10991, Dec. 23, 1987.

Delta Traffic Services (Campbell 66) v. Mennen, No. 88-1737 (D.N.J. Oct. 28, 1988).

Oneida v. Ormond Shops, Nos. 85-03606, 87-0527 (Bankr. Ct. N.J. Feb. 17, 1989) (reversing prior denial at ¶ 83,425).

NEW YORK

* *International Distribution Centers v. Lady Carol Dresses*, No. 14938/83 (Sup. Ct. N.Y. June 5, 1985), MC-C-10867, Jan 2, 1985.

* *International Dist. Centers v. Rhapsody Blouse & Sportswear, Inc.*, (83 Civ. No. 2803, S.D.N.Y. June 12, 1986).

Wilson Freight, Chief Freight Lines and Spector Red Ball v. Myers Prods., No. 82-5893-A (Bankr. Ct. S.D.N.Y. July 20, 1987), MC-C-30078, Jan. 11, 1989 (¶ 37,608).

NORTH CAROLINA

Carolina Motor Express Inc., v. Delaware Valley Shippers Assoc., Inc., No. SH-C-87-147 (W.D.N.C. Dec. 21, 1987), MC-C-30084, Sept. 9, 1988 (¶ 37,544) (ICC decision *aff'd* Apr. 20, 1989).

Carolina Motor Express Inc., v. California Consol. Enterprises, Inc., Nos. SH-B-86-00226, and 86-0498 (Bankr. Ct. W.D.N.C. Mar. 17, 1988), *rev'd* by W.D.N.C., Apr. 7, 1989 and case referred to ICC.

Motor Carrier Audit & Collection Co. (RTC) v. Family Dollar Stores, 670 F. Supp. 644 (W.D.N.C. 1987).

Catawba Valley Motor Line v. Bruard's Inc., No. ST-C-86-154 (W.D.N.C. Feb. 25, 1987), MC-C-30039, Jan. 5, 1988.

Delta Traffic Serv. (RTC Transp.) v. Goodmark Foods, Inc., No. 87-124-CIV-5 (E.D.N.C.), MC-C-30087, Dec. 20, 1988.

---

* Not referred by Court to ICC as Complaint filed initially with ICC by defendant. However, the Court acknowledged the ICC's primary jurisdiction and stayed the court action.

OHIO

Delta Traffic Serv. (Oneida) v. E.L. Mustee & Sons, No. C-87-1726 (N.D. Ohio Sept. 30, 1987) (¶ 83,407), MC-C-30072, Apr. 13, 1988 (¶ 37,462).

Detla Traffic Serv. (Oneida) v. AP Indus. and Goerlicks, Nos. C-87-7444, 7436 (N.D. Ohio Dec. 28, 1988), MC-C-30099.

Delta Traffic Serv. (Oneida) v. Synthetic Prod Co., No. C-87-1639 (N.D. Ohio June 20, 1988), MC-C-30066 (¶ 37,517) (ICC findings rejected Sept. 17, 1988) (¶ 37,517) (ICC findings rejected Sept. 17, 1988) (¶ 83,408).

Delta Traffic Serv. (Oneida) v. Star Bronze Co., No. C-87-1716 (N.D. Ohio Dec. 12, 1988), MC-C-30096.

Delta (RTC Transp.) v. Rubermaid, No. C87-376A (N.D. Ohio Sept. 9, 1987), MC-C-30083, Oct. 2, 1988.

OKLAHOMA

In re Amarex Inc., 74 Bankr. 378 (Bankr. Ct. W.D. Okla. 1987).

Perry Motor Freight v. Zidell Explorations, (N. D. Okla. Feb. 23, 1989), MC-C-30120.

OREGON

Delta Traffic Servs. (West Coast Tr. Line) v. Marine Lumber Co., No. 86-1124-Ma 683 F. Supp. 754 (D. Or. 1987), MC-C-30082 June 27, 1988 (¶ 37,501) (ICC decision *aff'd* Jan. 24, 1989).

PENNSYLVANIA

Branch Motor Express Company v. Caloric Corp., No. CA-86-4850 (E.D. Pa. Dec. 4, 1986), MC-C-30026, Apr. 29, 1988 (¶ 37,472) (ICC's decision rejected, Jan. 13, 1989).

Breman's Express Co. v. Don Fisher Sales, 69 Bankr. 356 (Bankr. Ct. W.D. Pa. 1987), MC-C-30034, Apr. 14, 1988 (¶ 83,299).

Breman's Exp. v. Mitchell Milling, 69 Bankr. 356 (Bankr. Ct. W.D. PA 1987), MC-C-30032, Oct. 14, 1987 (affirming ICC decision, Oct. 31, 1988) (¶ 83,416).

TENNESSEE

Motor Carrier Audit & Collection Co. v. Manufacturers Consol. Serv., No. 86-2431-MA (W.D. Tenn. Dec. 12, 1986), MC-C-30025, Nov. 19, 1987 (¶ 37,417).

Orr & Highway Express v. Sewell Plastics, No. 86-2874 CA (W.D. Tenn. Mar. 18, 1987), MC-C-30027, Jan. 25, 1988 (¶ 37,429) (On remand, affirming ICC's decision, 703 F. Supp. 676, Nov. 17, 1988) (¶ 83,424).

Rebel Motor Freight v. Freeman Prods., No. 86-2973-MA (W.D. Tenn. Mar. 11, 1987), MC-C-30015, Sept. 22, 1988 (¶ 37,558).

Rebel Motor Freight v. Anchor Glass, (W.D. Tenn.), MC-C-30089.

Rebel Motor Freight v. Farrell—Calhoun Paint, No. 18310-ITD, MC-C-30021.

Rebel Motor Freight v. Sewell Plastics, No. 86-2839 (W.D. Tenn.), MC-C-30021.

Rebel Motor Freight v. Diamond-Bathurst, No. 86-2652-MB (W.D. Tenn.), MC-C-30089, Apr. 7, 1987); Jan. 31, 1989.

TEXAS

Motor Carrier Audit & Collection Co. (Perry Motor Freight) v. Baldor Elec. Co., No. CA3-85-2002R (N.D. Tex. Oct. 7, 1987), MC-C-30019 (ICC's decision rejected, July 27, 1989).

Younger Transp. v. TMBR Drilling, No. MO-85-CA-020 (W.D. Tex. Feb. 14, 1986), MC-C-10962, July 19, 1987.

UTAH

IML Freight Inc. v. J.W.S. Delavau Co., Bankr. Case No. 83C-01950, No. 85 PC0314, MC-C-30073, Jan. 3, 1989.

Savage Bros. v. Carlyle Johnson, No. 86-299 (5th Jud. Dist. Jan. 9, 1988), MC-C-30107, Feb. 13, 1989.

VIRGINIA

Scott N. Brown, Jr., Trustee v. Express Transp. Co., Inc., No. 89-143-N (E.D. Va. June 9, 1989).

WASHINGTON

MC&C, Assignee of System 99 & West Coast Truck Lines v. Fisher Mills, (W.D. Wash.), MC-C-30106, Feb. 24, 1989.

WISCONSIN

ICX v. Klein Merchandising, No. 86 CV 109 (Cir. Ct. Wis. Feb. 26, 1987), MC-C-30040.

Maislin Indus. v. Packerland Packing Co., No. 85-C-339-S (W.D. Wis. Dec. 9, 1985) (¶ 83,248).

APPENDIX D

COURT DECISIONS DENYING REFERRAL OF REASONABLENESS ISSUES TO THE ICC

CALIFORNIA

West Coast Truck Lines v. Kaiser Aluminum & Chem., No. C-87-0048 (N.D. Cal. July 28, 1987) (¶ 83,336).

Milne Truck Lines & Consol./Mark v. American Licorise Co., No. C-88-1420 DLJ (N.D. Cal. Dec. 23, 1988).

Wescar Freight Sys. v. Conagra, Inc., No. C-88-4664 SAW (N.D. Cal. Jan. 26, 1989).

COLORADO

Motor Carrier Audit & Collection (Transp. Int'l) v. United Food Serv., No. 87-C-298 (D. Colo. May 4, 1987) (¶ 83,326).

Delta Traffic Servs. v. Georgia Pac. Corp., 684 F. Supp. 769 (D. Conn. 1987) (¶ 83,393).

Delta Traffic Servs. v. Cuisinarts, Inc., No. CA-H-87-424 (D. Conn. Oct. 28, 1987).

Delta Traffic Servs. and Campbell 66 Express v. Purdue Frederick Co., No. B-88-196 (D. Conn. Mar. 8, 1989).

GEORGIA

Feldspar Trucking Co. v. Greater Atl. Shippers, Ass'n, 683 F. Supp. 1375 (N.D. Ga. 1987) *aff'd* by Eleventh Circuit July 20, 1988 (¶ 83,397).

NOTE: The "¶ 37,000" series references are to Commerce Clearing House's Federal Carrier Cases reports for ICC decisions. The "¶ 80,000" series references are to CCH's court decisions in the same reports.

ILLINOIS

Motor Carrier Audit & Collection v. Casio, No. 6124 (N.D. Ill. Oct. 27, 1987).

Motor Carrier Audit Collection v. Medline Ind., No. 6123 (N.D. Ill. Nov. 2, 1987).

Motor Carrier Audit Collection v. Portion Packaging, Inc., No. 87-C-6108 (N.D. Ill. Apr. 22, 1988).

Motor Carrier Audit Collection v. C & D Charter Power Sys., No. 88-C-3161 (N.D. Ill., Oct. 27, 1988).

Transportation Int'l v. Bunge Edible Oil Corp., No. 86-C-9330 (N.D. Ill. May 11, 1987), *aff'd* by the Seventh Circuit July 27, 1987.

KANSAS

Manley Truck Line v. Dataguide Business Form, No. 87-40330-11 (D. Kan. Mar. 24, 1989).

MICHIGAN

IMFS, Inc. v. Nekoosa Papers, Inc., No. G86-355 (W.D. Mich. Aug. 28, 1986).

MISSOURI

Campbell 66 v. Transcrit Corp., Nos. 86-01697-S-1-11 and 88-205-S-1-11 (June 1, 1988).

MINNESOTA

Total Transp., Inc. v. Armour & Co., 84 Bankr. 590 (D. Minn. Mar. 18, 1988). (¶ 83,369).

Total Transp.. Inc. v. Portion Packaging, Inc., No. 6108 (N.D. Ill. Apr. 22, 1988).

Total Transp., Inc. v. BTS Transp. Servs., No. 4-87-269 (Apr. 8, 1988) (¶ 83,370).

Total Transp., Inc. v. Land O'Lakes, Inc., No. 4-87-227 (Bankr. Ct. Minn. Aug. 23, 1988).

Total Transp., Inc. v. Assoc. of Milk Producers, Nos. 4-87-215 & 276 (Bankr. Ct. Minn. May 11, 1988) (¶ 83,372).

Indianhead Truck Lines v. Miles Home Div. of Insileo, No. 4-86-325, (Bankr. Ct. Minn. Sept. 15, 1987) (¶ 83,372).

MISSISSIPPI

Delta and Dudley Trucking Co. v. Armstrong World Indus., No. J88-0099, (S.D. Miss. Nov. 4, 1988).

NEW JERSEY

Oneida Motor Freight, Inc. v .Felsway Corp., No. 87-0513 (Bankr. Ct. N.J. October 19, 1987) (¶ 83,346).

Oneida Motor Freight, Inc. v. C & A Wallcoverings, No. 87-0661 (Bankr. Ct. N.J. Oct. 19, 1987) (¶ 83,346).

Oneida Motor Freight, Inc. v. Ormond Shops, No. 87-0627 (Bankr. Ct. N.J. Oct. 19, 1987) (¶ 83,346).

Oneida Motor Freight, Inc. v. Ormond Shops, No. 87-0527 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

Oneida Motor Freight, Inc. v. Thomas J. Lipton, No. 87-0642 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

Oneida Motor Freight, Inc. v. Lionel Leisure, No. 87-0664 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

Oneida Motor Freight, Inc. v. C & A Wallcovering, No. 87-0661 (Bankr. Ct. N.J. Sept. 29, 1988) (¶ 83,425), reversed on reconsideration and referred to ICC, Feb. 17, 1989.

NEW YORK

Delta Traffic Serv. & Oneida MF v. Appo Paper & Plastics Corp., No. CV-87-2325 (E.D.N.Y. Nov. 2, 1988) (¶ 83,426) (Appeal Pending, 2nd Cir. No. 88-9057).

Delta Traffic Serv. (Oneida) v. Coffee Holding Co., No. CV-87-2011 (E.D.N.Y. June 3, 1988) (¶ 83,394).

NORTH CAROLINA

Carolina Motor Express Inc. v. California Consol. Enter., No. 86-0498 (Bankr. Ct. W.D.N.C. Mar. 25, 1987), *rev'd* (W.D.N.C. 1989).

McLean Trucking Co. v. Allied Business Forms, No. C-B-86-023, (Bankr. Ct. W.D.N.C. Apr. 28, 1988) (¶ 83,378).

Observer Transp. v. Service Merchandise, No. C-C-87-196-P (W.D.N.C. May 16, 1988) (¶ 83,418).

OHIO

Delta Traffic Serv., Inc. (Oneida Motor Freight) v. E.L. Mustee & Sons, No. C87-1737 (N.D. Ohio May 12, 1988).

Delta Traffic Serv., Campbell 66) v. Sun Chem. Dispersions, No. C-1-88-409 (S.D. Ohio Sept. 14, 1988).

Delta Traffic Serv. (Oneida) v. Lincoln Electric Co., No. C-87-1744 (N.D. Ohio June 15, 1988).

OREGON

Silver Wheel Freight Line v. AT&T Tech., Bankr. No. 382-03558-S7, Adv. No. 85-0743-S (D. Or. Oct. 23, 1986).

PENNSYLVANIA

Oneida Motor Freight, Inc. v. Occidential Chem., No. 85-03606, No. 87-4217 (E.D. Pa. Aug. 18, 1987) (¶ 83,381).

Oneida Motor Freight, Inc. v. Keystone Lighting, No. 87-4217 (E.D. Pa. Sept. 23, 1987).

Oneida Motor Freight, Inc. v. Pride Health Care, No. 87-0915 (M.D. Pa. Nov. 18, 1987).

Taynton Freight Systems v. Tripar Transp., No. 5-87-0080 (M.D. Pa. Aug. 14, 1987).

Halls Motor Lines v. I.B.M., No. 88-0717 (Feb. 22, 1989).

TENNESSEE

Delta (Campbell 66) v. Madison Mills, No. 3-88-0315 (Dec. 22, 1988).

Rebel Motor Freight, Inc. v. H.J. Muehlstein and Co., Inc., No. 87-2828-TUA (W.D. Tenn. Apr. 7, 1989) (¶ 83,449).

TEXAS

Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc. v. Supreme Beef Processors, Inc., 864 F.2d 388 (5th Cir. 1989).

Delta Traffic Serv. (One-Way Cartage System) v. Texas Cartage Terminal Warehouse, No. 3-86-2904-D (N.D. Tex. June 2, 1988) (¶ 83,384).

UTAH

Delta Traffic Serv. v. Sysco Intermountain Food Serv., No. 87-C-0345 (C.D. Utah Oct. 30, 1987). (After trial on the merits, Ct. dismissed the complaint, March 27-30, 1989, Written Opinion to follow).

WISCONSIN

G.M.W. Inc. v. Certified Parts Corp., 135 Wis.2d 503, 400 N.W.2d 512 (Ct. App. 1986).